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In the Supreme Court of the United States

OCTOBER TERM, 1994

COMMISSIONER OF INTERNAL REVENUE,
PETITIONER

v.

ROBERT F. LUNDY

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

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QUESTION PRESENTED

Whether 26 U.S.C. 6512(b)(3)(B) bars a taxpayer from obtaining a refund of an overpayment of income taxes in a Tax Court case (i) when he failed to file a return for more than two years after the return was due and (ii) then filed his return only after the Commissioner issued the notice of deficiency that led to the Tax Court litigation.

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ROBERT F. LUNDY

**PETITION FOR A WRIT OF CERTIORARI
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FOR THE FOURTH CIRCUIT**

The Solicitor General, on behalf of the Commissioner of Internal Revenue, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-29a) is reported at 45 F.3d 856. The opinion of the Tax Court (App., *infra*, 30a-52a) is reported at 65 T.C.M. (CCH) 3011.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

(1)

STATUTORY PROVISIONS INVOLVED

1. Section 6511, 26 U.S.C., provides, in relevant part:

(a) Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. * * *

* * * * *

(b)(2)(A) If the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return. * * *

* * * * *

(b)(2)(B) If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.

* * * * *

2. Section 6512, 26 U.S.C., provides, in relevant part:

(b)(1) Except as provided by paragraph (3) and by section 7463, if the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of income tax for the same taxable year, * * * the Tax Court shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Tax Court has become final, be credited or refunded to the taxpayer.

* * * * *

(b)(3) No such credit or refund shall be allowed or made of any portion of the tax unless the Tax Court determines as part of its decision that such portion was paid—

* * * * *

(B) within the period which would be applicable under section 6511(b)(2), (c), or (d), if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) stating the grounds upon which the Tax Court finds that there is an overpayment * * *.

STATEMENT

1. Although federal income taxes were withheld from respondent's wages during 1987, he failed to file an income tax return for that year when it was due, on April 15, 1988. More than two years later, on September 26, 1990, in the absence of any return from respondent, the Commissioner of Internal Revenue

mailed respondent a notice of deficiency of \$13,806 in his income taxes for 1987. Three months later, on December 22, 1990, respondent filed a joint income tax return for 1987 with his wife. That untimely return asserted a \$3,537 overpayment of their joint income tax liability for 1987 (App., *infra*, 2a).

2. a. On December 28, 1990, respondent sought a redetermination in the Tax Court of the deficiency asserted by the Commissioner in his 1987 income taxes. Respondent also sought a further determination that he had overpaid his 1987 taxes by \$3,537. Upon review of the information contained in respondent's untimely return, the Commissioner filed an amended answer that acknowledged that a deficiency did not exist in respondent's 1987 taxes and that respondent had, in fact, made an overpayment of \$3,537 in the taxes that he owed for that year (App., *infra*, 2a).

Following these stipulations, the only issue remaining in the Tax Court was whether respondent was entitled to a refund of the overpayment. The Commissioner contended that a refund of the overpayment was barred by the provisions of Sections 6511 and 6512 of the Internal Revenue Code, 26 U.S.C. 6511, 6512 (App., *infra*, 3a).

b. The Tax Court agreed with the Commissioner that Sections 6511 and 6512 bar any recovery upon respondent's refund claim (App., *infra*, 30a-52a). The court noted that Section 6512(b)(3)(B) limits the amount of any overpayment that may be refunded in a Tax Court case to the amount that would have been refundable under Section 6511(b)(2) if a claim for refund had been filed by the taxpayer "on the date of the mailing of the notice of deficiency" (App., *infra*, 37a, quoting 26 U.S.C. 6512(b)(3)(B)). The court

stated that Section 6512(b)(3)(B) "directs us to focus on the situation as it would have been on a specified date—the date of the mailing of the notice of deficiency. Thus, this provision requires us to 'take a snapshot' of the situation" as of the date of the mailing of the notice of deficiency (App., *infra*, 38a). Because, as of the date the notice of deficiency was mailed, respondent had not filed a return for his 1987 taxes, the amount of the overpayment of tax that was refundable to him was the amount of tax he had paid within the two-year period immediately preceding the date that the notice of deficiency was mailed (*id.* at 39a, citing 26 U.S.C. 6511(b)(2)(B)). Since respondent had not paid any of the taxes involved in this case during the two-year period preceding the notice of deficiency, the court concluded that Section 6512(b)(3)(B) bars any refund of respondent's overpayment (App., *infra*, 39a).

3. The court of appeals reversed (App., *infra*, 1a-29a). In doing so, the court rejected the decisions of several other circuits that had upheld the Tax Court's analysis of these statutory provisions (*id.* at 21a-22a, citing, *e.g.*, *Richards v. Commissioner*, 37 F.3d 587 (10th Cir. 1994), petition for cert. pending, No. 94-1537).¹ The court of appeals held in the present case (App., *infra*, 12a) that, notwithstanding the plain language of the statute, Section 6512(b)(3)(B) does not require the Tax Court to test the taxpayer's claim for refund as if it were filed on the date that the notice of

¹ See also *Davison v. Commissioner*, 9 F.3d 1538 (2d Cir. 1993) (Table) (unpub.), *aff'g* 64 T.C.M. (CCH) 1517 (1992); *Allen v. Commissioner*, 23 F.3d 406 (6th Cir. 1994) (Table) (unpub.), *aff'g* 99 T.C. 475 (1992); *Galuska v. Commissioner*, 5 F.3d 195 (7th Cir. 1993).

deficiency was issued.² In reaching that conclusion, the court of appeals relied on what it perceived to be evidence in “the legislative history of § 6512 [that] indicates that Congress intended a taxpayer who filed a claim for refund within three years of filing a tax return to have a three-year refund period that runs from the date of the mailing of the notice of deficiency” (App., *infra*, 17a). Based on this reading of the legislative history, the court stated (*ibid.*):

We interpret § 6512(b)(3)(B) to provide for a three-year refund period where the taxpayer files a claim for refund in Tax Court within three years of filing his tax return and to commence the refund period from the date of the mailing of the notice of deficiency.

The court of appeals also relied on what it perceived to be the potential anomaly that respondent “would have received his refund if he had filed his claim for refund in a United States district court or the United States Claims Court” (App., *infra*, 10a). In making this assertion, the court assumed that a return filed by a taxpayer more than two years after the return is due would permit a subsequent refund claim to invoke the three-year refund period of Section 6511(b)(2)(A). The court recognized (App., *infra*, 27a) that its

² The Court of appeals also expressly disagreed (App., *infra*, 22a, 25a-28a) with the Ninth Circuit’s analysis of Section 6511 in *Miller v. United States*, 38 F.3d 473 (1994). The analysis of the Ninth Circuit in *Miller* led directly to that court’s decision in *Rossmann v. Commissioner*, 46 F.3d 1144 (1995) (Table), which held that Section 6512(b)(3)(B) barred a refund of the overpayment made by the taxpayer in that case. The decision in *Rossmann* directly conflicts with the decision of the court of appeals in the present case.

assumption that the same taxpayer would fare differently in a refund suit in the Court of Federal Claims or in federal district court than in the Tax Court had been squarely rejected by the Ninth Circuit in *Miller v. United States*, 38 F.3d 473, 475-476 (1994). In *Miller*, the court ruled that, when a return is not filed within “two years after payment,” the taxpayer’s claim—whether brought in the Court of Federal Claims, federal district court or in the Tax Court—is barred by Section 6511(a). 38 F.3d at 476. The court explained in *Miller* that an untimely return filed more than two years after the date of payment “cannot resurrect the three-year period” (*id.* at 475):

If the clock were to run only from the filing of the return, no claim would ever be barred as long as the return was not filed. * * * The point at which one must determine whether a return has or has not been filed, for purposes of [Section 6511(a)], must be two years after payment. Otherwise, no claim could ever finally be barred by the two-year-after-payment clause because the taxpayer could at any time file a return and have three more years to assert the claim.

In the present case, however, the court of appeals expressly disagreed with the reasoning of *Miller*. The court concluded instead that, “under § 6511(a), [a taxpayer] has three years from the date of the filing of even a delinquent tax return to file a claim for refund” (App., *infra*, 27a). The court did not attempt to explain what, if any, role it would attribute to the two-year limit on refunds under Section 6511(a) that was central to the court’s decision in *Miller*.

The court of appeals summarized its holding in the present case as follows (App., *infra*, 12a):

We hold that the Tax Court, when applying the limitation provision of § 6511(b)(2) in light of § 6512(b)(3)(B), should substitute the date of the mailing of the notice of deficiency for the date on which the taxpayer filed the claim for refund, but only for the purpose of determining the benchmark date for measuring the limitation period and not for the purpose of determining whether the two-year or three-year limitation period applies. In other words, we interpret § 6512(b)(3)(B) as merely shifting back the benchmark date of the refund period from the date on which the taxpayer filed the claim for refund to the date on which the IRS mailed the notice of deficiency; § 6512(b)(3)(B) does not change the length of the refund period from what would have been applied under § 6511(b)(2).

Because the entire amount of the overpayment involved in this case had been made within three years of the date of the notice of deficiency and within three years of respondent's belated income tax return, the court concluded that respondent was entitled to a refund of the overpayment under Section 6512(b)(3)(B) (App., *infra*, 13a).

REASONS FOR GRANTING THE PETITION

As the court of appeals acknowledged (App., *infra*, 21a), the decision in this case directly conflicts with the decision of the Tenth Circuit in *Richards v. Commissioner*, 37 F.3d 587 (1994), petition for cert. pending, No. 94-1537. It also conflicts with the decision of the Seventh Circuit in *Galuska v.*

Commissioner, 5 F.3d 195 (1993), and with the unreported decisions of the Second, Sixth and Ninth Circuits in *Davison v. Commissioner*, 9 F.3d 1538 (1993) (Table), *Allen v. Commissioner*, 23 F.3d 406 (1994) (Table), and *Rossman v. Commissioner*, 46 F.3d 1144 (1995) (Table).

For the reasons set forth in the Commissioner's brief acquiescing in the petition for a writ of certiorari filed in *Richards v. Commissioner*, No. 94-1537, the question presented in this case is a recurring one of substantial importance on which the courts of appeals are in express disagreement.³ Because this case presents the same question presented in *Richards*, and involves facts that are indistinguishable from the facts of *Richards*, the petition in this case should be held and disposed of as appropriate in light of this Court's disposition of *Richards*.

³ We are supplying counsel for respondent in this case with a copy of our brief in *Richards*.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of this Court's disposition of *Richards v. Commissioner*, No. 94-1537.

Respectfully submitted.

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APRIL 1995

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 94-1260

ROBERT F. LUNDY, PETITIONER-APPELLANT

v.

INTERNAL REVENUE SERVICE,
RESPONDENT-APPELLEE

Appeal from the United States Tax Court
(Tax Ct. No. 90-29009)

Argued Dec. 7, 1994
Decided Jan. 30, 1995

Before: RUSSELL and MICHAEL, Circuit Judges, and
MESSITTE, United States District Judge
for the District of Maryland, sitting by
designation.

OPINION

RUSSELL, Circuit Judge:

Robert F. Lundy appeals the judgment of the United States Tax Court denying his claim for a refund of income taxes withheld in 1987. This case requires this Court to interpret sections 6511 and 6512 of the Internal Revenue Code (the "Code") to determine whether Lundy's refund claim was timely.

(1a)

I.

Lundy was employed in 1987 and had federal income tax withheld from his wages. He did not file a tax return by April 15, 1988, the due date for 1987 tax returns. On September 26, 1990, over two years after Lundy's tax return was due, the Commissioner of Internal Revenue mailed Lundy a notice of deficiency, notifying him that there was a deficiency in the amount of \$13,806 in his income tax for 1987.

On December 22, 1990, Lundy mailed his 1987 tax return (filed jointly with his wife), which was received by the Internal Revenue Service (the "IRS") on December 28, 1990. The return showed an overpayment of income tax in the amount of \$3,537. On December 28, 1990, Lundy filed a petition in the Tax Court requesting it to determine that there was an overpayment of tax and that he was entitled to a refund.

The Commissioner filed her answer on February 19, 1991. She generally denied the allegations in Lundy's petition but did not at that time claim that Lundy's petition was time-barred. In the Tax Court, the parties stipulated that Lundy's tax liability for 1987 was \$778 greater than the amount stated on the tax return. Joint Appendix ("J.A.") 13. The parties also stipulated that there was an addition to tax of \$369 under 26 U.S.C. § 6653(a)(1)(A). J.A. 14. The parties also stipulated that the Commissioner, in a conference call with the Tax Court, "indicated that it was her understanding that a settlement had been reached which involved a refund." J.A. 56. On February 3, 1992, the IRS sent a notice to Lundy which stated the following:

Amount to be refunded to you if you owe no other obligations \$3,537.00

You may have already received this check. If not, please allow 2 weeks for it to be mailed to you,

unless there are other matters pending which could postpone your refund.

On March 17, 1992, more than a year after the Commissioner filed her answer, the Commissioner filed a motion to amend her answer and raised the defense that Lundy's claim for refund was time-barred by the limitation periods of 26 U.S.C. §§ 6511 and 6512. The Tax Court granted the motion.

On June 28, 1993, the Tax Court held that it could not grant a refund for the overpayment of income tax. The Tax Court held that, under 26 U.S.C. § 6512(b)(3) (B), Lundy is entitled to a refund only for taxes paid within two years prior to the date that the Commissioner sent the notice of deficiency. Lundy's tax payments, consisting of amounts withheld from his and his wife's wages, are deemed to have been paid on April 15, 1988. 26 U.S.C. § 6513(b)(1). Because the Commissioner sent the notice of deficiency on September 26, 1990, more than two years after the date Lundy is deemed to have paid his taxes (April 15, 1988), the Tax Court could not order a refund for the overpayment of taxes. Both parties agree that if Lundy had filed a claim for refund in a United States district court or in the United States Claims Court, he would have received his refund.

II.

The limitation provisions in 26 U.S.C. § 6511 apply to claims for refund filed in a United States district court or in the United States Court of Claims. The limitation provisions in 26 U.S.C. § 6512 apply to petitions filed in the United States Tax Court. Because Lundy filed a petition in the Tax Court, the limitation provisions in § 6512 apply to this case. For background, however, we first provide an overview of § 6511.

Section 6511 imposes limitations on both the period for filing a claim for refund (the "filing period"), 26

U.S.C. § 6511(a), and the period for calculating the amount of refund (the "refund period"), 26 U.S.C. § 6511(b). Regarding the filing period, § 6511(a) requires that the taxpayer file a claim for refund within three years of filing a tax return or within two years of paying the tax. 26 U.S.C. § 6511(a).¹

The refund period in § 6511(b) restricts the taxpayer's ability to recover overpaid taxes to either the two-year or three-year period immediately preceding the filing of the refund claim. Which refund period applies depends upon how the taxpayer satisfied the requirements of § 6511(a). If the taxpayer satisfied § 6511(a) by filing the claim for refund within three years of filing a tax return, the three-year refund period applies, which means that the taxpayer can recover overpaid taxes that were paid within the three years preceding the filing of the claim. 26 U.S.C. § 6511(b)(2)(A). If the taxpayer has satisfied § 6511(a) by filing the claim for refund within two years of paying the tax, the two-year refund period applies, which means that the taxpayer can recover overpaid taxes that were paid only within two years preceding the filing of the claim. 26 U.S.C. § 6511(b)(2)(B).²

¹ Section 6511(a) reads, in relevant part, as follows:

(a) Period of Limitation on Filing Claim

Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid.

26 U.S.C. § 6511(a).

² Section 6511(b)(2) reads, in relevant part, as follows:

(b) Limitation on allowance of credits and refunds

Section 6511 gives a taxpayer three years from the due date of his income tax return to claim a refund for all income tax withheld from him during the tax year. The due date for 1987 income tax returns, for instance, was April 15, 1988. If a taxpayer filed a claim for refund of 1987 taxes in a United States district court or the United States Claims Court between April 15, 1988 and April 15, 1991, the taxpayer would satisfy the requirement of § 6511. He could easily meet the limitation requirement of § 6511(a) simply by filing a tax return before filing the claim for refund.³ Furthermore, the three-year limitation period would apply under § 6511(b)(2)(A); since taxes withheld during the 1987 tax year are deemed to have been paid on April 15, 1988, 26 U.S.C. § 6513(b)(1),⁴ the

* * *

(2) Limit on amount of credit or refund

(A) Limit where claim filed within 3-year period

If the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return. . . .

(B) Limit where claim not filed within 3-year period

If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.

26 U.S.C. § 6511(b)(2).

³ This is a matter of course, because a taxpayer files a claim for refund by filing an income tax return.

⁴ Section 6513(b)(1) reads, in relevant part, as follows:

(b) Prepaid income tax

taxpayer could collect a refund of any overpayment of withheld taxes as long as the taxpayer filed his claim on or before April 15, 1991. On the other hand, if the taxpayer filed his claim for refund after April 15, 1991, the claim would be barred under § 6511(b) because the payment of taxes occurred more than three years from the date of the filing of the claim. Nonetheless, when a taxpayer fails to file a tax return by the due date, he has a three-year window of opportunity to file a tax return and claim his refund.

The two-year refund period allows certain taxpayers, in very specific circumstances, to file a legitimate claim for refund beyond the three-year window of opportunity. Although a taxpayer normally pays income tax during the tax year and is deemed to have paid the tax on April 15 of the following year, a taxpayer may have a reason to pay additional tax after this time. In such a case, the taxpayer can file a claim for refund more than three years from the due date of tax returns, as long as the claim is filed within two years of paying the additional tax. Furthermore, the amount of refund is limited to the amount of the additional tax paid within two years of filing the claim. The two-year period, however, does not cut short the three-year window of opportunity that taxpayers have to collect refunds on their withheld tax; it only extends the three-year window in cases where the taxpayer paid additional tax after the due date of tax returns.

For purposes of section 6511 or 6512—

(1) Any tax actually deducted and withheld at the source during any calendar year . . . shall . . . be deemed to have been paid by him on the 15th day of the fourth month following the close of his taxable year. . . .

26 U.S.C. § 6513(b)(1).

III.

The limitation provisions in 26 U.S.C. § 6512 apply to Lundy's case because he filed a petition in the United States Tax Court. A taxpayer can invoke the jurisdiction of the Tax Court only if the IRS sends a notice of deficiency. A taxpayer can challenge the notice of deficiency in the Tax Court by filing a petition for redetermination. The petition may include a claim for a refund of an overpayment. If, in its redetermination of a taxpayer's liability, the Tax Court finds that the taxpayer has made an overpayment of tax, § 6512(b)(1) gives the Tax Court jurisdiction to determine the amount of such overpayment and to include the refund in its final order. Because a taxpayer files a petition for redetermination in the Tax Court only in response to a notice of deficiency, there is no equivalent in § 6512 to the filing period of § 6511(a).

On the other hand, the Tax Court is also limited by a refund period. Section 6512(b)(3) limits the period for which the Tax Court can calculate the amount of refund. That section reads, in relevant part, as follows:

(3) Limit on amount of credit or refund

No such credit or refund shall be allowed or made of any portion of the tax unless the Tax Court determines as part of its decision that such portion was paid—

* * *

(B) within the period which would be applicable under section 6511(b)(2), (c), or (d), if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) stating

the grounds upon which the Tax Court finds that there is an overpayment. . . .⁵

26 U.S.C. § 6512(b)(3)(B). Section 6512(b)(3)(B) cross-references to § 6511(b)(2) to determine the refund period.⁶ The crux of this case is whether the Tax Court, when determining the refund period under § 6512(b)(3)(B), should have applied the three-year limitation period under § 6511(b)(2)(A) or the two-year limitation period under § 6511(b)(2)(B).

A.

The Tax Court accepted the Commissioner's argument that, under § 6512(b)(3)(B), a taxpayer is deemed to have filed a claim for refund on the date the notice of deficiency was mailed to him. When the Tax Court determined the appropriate refund period under § 6511(b)(2), it deemed that Lundy had filed his claim for refund on September 26, 1990, the date the Commissioner mailed the notice of deficiency to Lundy, even though Lundy actually filed his claim for refund with his petition for redetermination on December 28, 1990.

The Tax Court applied the two-year limitation period under § 6511(b)(2)(B) instead of the three-year limitation period under § 6511(b)(2)(A). The Tax Court did not apply the three-year limitation period because Lundy did not file his claim for refund within three years of filing his tax return. Because the Tax Court deemed that Lundy filed his claim on September 26, 1990, the date of the mailing of the notice of deficiency, the Tax Court concluded that Lundy filed a claim for refund before he filed a tax return, which Lundy did not file until December 28,

⁵ The parties agree that § 6512(b)(3)(A) and (C) do not apply to this case.

⁶ The parties agree that § 6511(c) and (d) do not apply to this case.

1990. Thus, the Tax Court applied the two-year limitation period.

Because Lundy was deemed to have paid his taxes on April 15, 1988, more than two years before the date the Tax Court deemed that he filed his claim for refund (September 26, 1990), the Tax Court concluded that it had no authority to grant Lundy a refund.

B.

One problem with the Tax Court's reading of § 6512(b)(3)(B) is that the language of that section does not include the word "deemed." The word "deemed" is used in many sections throughout the Code, but not in § 6512. For example, § 6513(b) provides that income tax withheld during a tax year shall be "deemed" to have been paid on April 15 of the following year, 26 U.S.C. 6513(b)(1), and that any amount paid as estimated income tax shall be "deemed" to have been paid on the due date for filing tax returns, 26 U.S.C. § 6513(b)(2). The Code also provides that "any return filed before the last day prescribed for the filing thereof shall be *considered* as filed on such last day. For purposes of section 6511(b)(2) and (c) and section 6512, payment of any portion of the tax made before the last day prescribed for the payment of the tax shall be *considered* made on such last day." 26 U.S.C. § 6513(a) (emphasis added).

In sharp contrast, § 6512(b)(3)(B) does not use the word "deemed" or "considered." Instead, the provision directs the Tax Court to apply the refund period that would apply under § 6511(b)(2) in the hypothetical situation that the taxpayer had filed a claim for refund on the date of the mailing of the notice of deficiency. If Congress had intended that a claim for refund filed in the Tax Court shall be deemed to have been filed on the date of the mailing of

the notice of deficiency, Congress could have said so explicitly.

C.

Furthermore, the Tax Court's interpretation of § 6512(b)(3)(B) has pernicious effects. The result of the Tax Court's holding is that Lundy cannot receive a refund even though he overpaid his taxes and filed a tax return and claim for refund within three years of the due date for filing tax returns. Lundy, however, would have received his refund if the circumstances had been only slightly different.

Lundy would have received his refund if he had filed his claim for refund in a United States district court or the United States Claims Court. Because § 6512 does not apply in a district court or in the Claims Court, only the Tax Court can deem that Lundy filed his claim for refund on the date of the notice of deficiency. Thus, if Lundy had filed a claim for refund in a district court or in the Claims Court on December 28, 1990, the court would have applied the three-year limitation period under § 6511(b)(2)(A) because on that day he filed his tax return. The date that Lundy filed his claim for refund was deemed to be September 26, 1990 only because he filed his claim for refund in Tax Court, and thus, § 6512(b)(3)(B) applied.⁷

⁷ We note, incidentally, that choosing to file a claim for refund in a district court or in the Claims Court would have been a difficult option for an average taxpayer like Lundy. Once the IRS sent Lundy a notice of deficiency, Lundy could file a claim for refund in one of these courts only if he first paid the amount of deficiency that the IRS claimed that he owed. Thus, Lundy would have had to pay \$13,806 before he could challenge the notice of deficiency and claim his refund in a district court or in the Claims Court. Even if Lundy had been aware of his option to avail himself of these courts, the requirement to pay the deficiency in advance, given his

Furthermore, Lundy would have received his refund if Lundy had filed his tax return sometime before the Commissioner sent Lundy a notice of deficiency on September 26, 1990. In this situation, if Lundy had filed his claim for refund in the Tax Court on December 28, 1990, the Tax Court still would have deemed September 26, 1990 as the date on which Lundy filed his claim for refund. However, the three-year limitation would have applied under § 6511(b)(2)(A) because the "deemed" date of filing the claim for refund would have been within three years of Lundy's filing of his tax return. Because Lundy paid his taxes on April 15, 1988, within three years of filing his claim for refund (September 26, 1990), the Tax Court would have had the authority to grant Lundy a refund.

Still further, Lundy would have received his refund if the Commissioner of Internal Revenue had happened to send the notice of deficiency before April 15, 1990. The Tax Court still would have applied the two-year limitation period from the date of the notice of deficiency, but the two-year period would have been sufficient to include April 15, 1988, the date on which Lundy paid his taxes.

Lundy did not receive his refund only because (1) he filed his claim for refund in Tax Court instead of a district court or Claims Court, (2) he filed his tax return after the Commissioner sent a notice of deficiency, and (3) the Commissioner sent the notice of deficiency more than two years after the date on which Lundy paid his taxes. If any one of these circumstances had been different, Lundy would have received his refund.

income, would most likely have prohibited him from filing his claim for refund there. The advantage of and reason for the Tax Court is that the average taxpayer can challenge a notice of deficiency without first having to pay the deficient amount.

IV.

We reject the Tax Court's interpretation of § 6512(b)(3)(B) and hold that the three-year limitation period should have applied to Lundy.

Section 6512(b)(3)(B) requires the Tax Court to apply the limitation provision in § 6511(b)(2) that would be applicable if, on the date the IRS mailed the notice of deficiency, the taxpayer had filed a claim for refund, regardless of whether the taxpayer actually had filed a claim for refund on that day. In § 6511(b)(2), however, the date of the filing of the claim for refund is critical for two reasons. First, the date on which the taxpayer filed the claim for refund, if it is within three years after the filing of the tax return, establishes that a three-year limitation period applies instead of a two-year limitation period. Second, the date on which the taxpayer filed the claim for refund is the benchmark date for measuring the limitation period (whether two-year or three-year).

We hold that the Tax Court, when applying the limitation provision of § 6511(b)(2) in light of § 6512(b)(3)(B), should substitute the date of the mailing of the notice of deficiency for the date on which the taxpayer filed the claim for refund, but only for the purpose of determining the benchmark date for measuring the limitation period and not for the purpose of determining whether the two-year or three-year limitation period applies. In other words, we interpret § 6512(b)(3)(B) as merely shifting back the benchmark date of the refund period from the date on which the taxpayer filed the claim for refund to the date on which the IRS mailed the notice of deficiency; § 6512(b)(3)(B) does not change the length of the refund period from what would have been applied under § 6511(b)(2).⁸

⁸ We note that the Internal Revenue Code does not allow a taxpayer to delay indefinitely his response to a notice of

Thus, the Tax Court should have applied the three-year limitation period in Lundy's case and should have begun the three-year period from the date on which the IRS mailed Lundy the notice of deficiency. Under § 6511(b)(2), the three-year limitation period applies because Lundy filed his claim for refund on December 28, 1990, within three years of filing his tax return, which he did also on December 28, 1990. Because Lundy filed his claim for refund in the Tax Court, § 6512(b)(3)(B) allows the Tax Court to count back three years from the date of the mailing of the notice of deficiency, instead of the date on which Lundy filed his claim. Because Lundy paid his taxes on April 15, 1988, within three years of the date of the mailing of the notice of deficiency (September 26, 1990), the Tax Court had the authority to determine the amount of Lundy's overpayment and to order a refund.

In our view, § 6512(b)(3)(B) never mandates a two-year refund period in the Tax Court where a United States district court or the United States Claims Court would have applied the three-year period under § 6511(b)(2). Instead, Congress intended in § 6512(b)(3)(B) to provide some relief for taxpayers who receive a notice of deficiency, by allowing the three-year period to run from the date of the notice of the deficiency instead of the date on which the taxpayer actually files the claim for refund. Thus, a taxpayer who receives a notice of deficiency can still recover his overpayment of taxes even though he did not actually file the claim for refund within three

deficiency. Section 6213(a) of the Code requires a taxpayer who wants to challenge a notice of deficiency to file a petition for redetermination within 90 days of the mailing of the notice of deficiency. 26 U.S.C. § 6213(a). For more on this point, see our discussion of *Galuska v. Commissioner*, 5 F.3d 195 (7th Cir.1993), *infra* at section V.

years of the due date for tax returns. In other words, § 6512(b)(3)(B) extends the three-year window of opportunity to claim a refund for taxpayers who receive a notice of deficiency from the IRS.

The legislative history of § 6512 supports our interpretation of § 6512(b)(3)(B). Section 6512(b)(3) of the Code was derived from § 322(d) of the Internal Revenue Code of 1939, ch. 2, 53 Stat. 1, 92 (1939). Section 322(d) read, in pertinent part, as follows:

No such credit or refund shall be made of any portion of the tax unless the Board [of Tax Appeals] determines as part of its decision that such portion was paid (1) within three years before the filing of the claim or the filing of the petition, whichever is earlier, or (2) after the mailing of the notice of deficiency.

53 Stat. at 91. Originally, then, the Board of Tax Appeals, the predecessor to the Tax Court, clearly applied a three-year refund period; unlike the current statute, however, the three-year period ran from the date on which the taxpayer filed his claim for refund or his petition for redetermination, and not from the date of the mailing of the notice of deficiency.⁹

⁹ In the 1939 Code, § 322(b)(1), the predecessor of § 6511(a), provided the same general rule as the current provision. It read as follows:

(b) Limitation on Allowance.—

(1) Period of limitation.—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expired the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid,

The two-year limitation period did not enter the Code until the 1942 amendments. Congress amended § 322(d) to read, in relevant part, as follows:

No such credit or refund shall be made of any portion of the tax unless the Board [of Tax Appeals] determines as part of its decision (1) that such portion was paid (A) within two years before the filing of the claim, the mailing of the notice of deficiency, or the execution of an agreement by both the Commissioner and the taxpayer . . . whichever is earliest, or (B) within three years before the filing of the claim, the mailing of the notice of deficiency, or the execution of the agreement, whichever is earliest, if the claim was filed, the notice of deficiency mailed, or the agreement executed within three years from the time the return was filed by the taxpayer. . . .

Revenue Act of 1942, ch. 619, § 169(b), 56 Stat. 798, 877-78 (1942). Under this provision, Lundy would

unless before the expiration of such period a claim therefor is filed by the taxpayer.

Internal Revenue Code of 1939, ch. 2, § 322(b)(1), 53 Stat. 1, 91 (1939).

Section 322(b)(2), the predecessor of § 6511(b), contained only a three-year refund period. Like § 322(d), there was no mention of a two-year refund period. The language of § 322(b)(2) read as follows:

(2) Limit on amount of credit or refund.—The amount of the credit or refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim, or, if no claim was filed, then during the three years immediately preceding the allowance of the credit or refund.

Internal Revenue Code of 1939, ch. 2, § 322(b)(2), 53 Stat. 1, 92 (1939).

clearly have received a refund. The three-year refund period would have applied because Lundy filed a claim for refund within three years of filing a tax return. The three-year refund period would have run from the date of the mailing of the notice of deficiency because it was earlier than the date of the filing of the claim for refund. The language does not indicate that, because the mailing of the notice of deficiency occurred before the filing of the tax return, the two-year refund period should apply.¹⁰

In the Internal Revenue Code of 1954, § 6512 replaced § 322(d) of the 1942 Code. Although the language of § 6512 differed from the language in the 1942 Code, the legislative history makes clear that Congress intended to make no material change to this

¹⁰ The 1942 amendments also changed § 322(b)(2) to include the two-year refund period in courts other than the Board of Tax Appeals. The new language of § 322(b)(2) read as follows:

(2) Limit on Amount of Credit or Refund.—The amount of the credit or refund shall not exceed the portion of the tax paid—

(A) If a return was filed by the taxpayer, and the claim was filed within three years from the time the return was filed, during the three years immediately preceding the filing of the claim.

(B) If a claim was filed, and (i) no return was filed, or (ii) if the claim was not filed within three years from the time the return was filed by the taxpayer, during the two years immediately preceding the filing of the claim. . . .

Revenue Act of 1942, ch. 619, § 169(a), 56 Stat. 798, 876 (1942). In the 1942 Code, then, a taxpayer who filed a claim for refund within three years of filing a tax return received a three-year refund period regardless of the forum in which he chose to file. The only difference in the Board of Tax Appeals was that the three-year refund period began running from the date of the mailing of the notice of deficiency, if it was earlier than the date of filing the claim for refund.

section. See H.R.Rep. No. 1337, 83d Cong., 2d Sess. A415 (1954) ("This section [§ 6512] makes no material changes from existing law."), *reprinted* in 1954 U.S.C.C.A.N. 4017, 4563; S. Rep. No. 1622, 83d Cong., 2d Sess. 586 (1954) ("This section [§ 6512] of the House bill, which contains no material change from existing law, was adopted by your committee with two clarifying changes."), *reprinted* in 1954 U.S.C.C.A.N. 4621, 5236. The amendments to § 6512 since 1954 have made no significant changes to the section.

Thus, the legislative history of § 6512 indicates that Congress intended a taxpayer who filed a claim for refund within three years of filing a tax return to have a three-year refund period that runs from the date of the mailing of the notice of deficiency. There is no indication that Congress ever intended the two-year period to apply to taxpayers who filed a tax return and claim for refund in Tax Court after receiving a notice of deficiency that was mailed to the taxpayer more than two years after the due date of tax returns. We interpret § 6512(b)(3)(B) to provide for a three-year refund period where the taxpayer files a claim for refund in Tax Court within three years of filing his tax return and to commence the refund period from the date of the mailing of the notice of deficiency.

Our interpretation of § 6512(b)(3)(B), besides being consistent with congressional intent, eliminates the inequities resulting from the Tax Court's reading. First, a taxpayer will receive the same limitation period in the Tax Court that he would receive in a United States district court or in the United States Claims Court. There is no rational reason why a taxpayer should have a three-year limitation period shortened to a two-year period simply because he chose the Tax Court as the forum for his claim for refund; if there is such a rational reason, Congress certainly has not articulated it.

On the other hand, it does make sense to allow the limitation period, whether two-year or three-year, to run from the date of the mailing of the notice of deficiency instead of the date of the filing of the claim for refund. Once the IRS mails the taxpayer a notice of deficiency, the taxpayer has to respond in order to avoid paying the deficiency claimed by the IRS. Because the IRS puts the taxpayer to the task of organizing his financial records and filing a tax return, the taxpayer should then be able to collect any refund due to him if the taxpayer could have filed a return and claimed a refund on the date the IRS mailed the notice of deficiency. Otherwise, the IRS could mail the notice of deficiency one day before the three-year window of opportunity for filing claims for refunds expires. In such a case, the taxpayer would have to respond to the notice of deficiency but would probably not be able to organize his financial records and file a claim for refund before the three-year period expires; in fact, the taxpayer probably would not even receive the notice of deficiency before the three-year period for claiming refunds expired. Because the Tax Court is the forum in which taxpayers challenge notices of deficiency, it makes sense that the Tax Court should apply the refund period from the date of the mailing of the notice of deficiency instead of the date of the filing of the claim for refund.

Our interpretation of § 6512(b)(3)(B) also eliminates a second inequity: a taxpayer who files his tax return after receiving a notice of deficiency will receive the same three-year limitation period that he would receive if he had filed his tax return before the IRS mailed the notice of deficiency. There is no rational reason why the taxpayer should have a three-year refund period cut short to two years simply because the IRS beat the taxpayer to the punch by mailing the notice of deficiency first. Congress certainly did not

intend the length of the refund period to turn on such an arbitrary distinction.

Finally, our interpretation of § 6512(b)(3)(B) eliminates a third inequity: a taxpayer has the same opportunity to collect a refund in Tax Court regardless of whether the IRS happened to send the notice of deficiency within two years of the due date for filing tax returns or more than two years from the due date for filing tax returns. There is no logical reason why a taxpayer should be allowed to receive a refund in Tax Court simply because the IRS fortuitously mailed the notice of deficiency within two years of the due date for filing tax returns. While it might be fair to deny a taxpayer his refund because he failed to act quickly enough, it is completely unfair to deny a taxpayer his refund simply because the IRS failed to act quickly enough. Congress certainly did not intend for the taxpayer's ability to collect a refund in Tax Court to turn on when the IRS mailed its notice of deficiency.

The Commissioner's interpretation of § 6512(b)(3)(B) of the Code, which the Tax Court has accepted below and in numerous other decisions, goes against the clear intent of Congress and against common sense. It creates a loophole for the IRS, allowing it to deny refunds to taxpayers who have overpaid their taxes and who have filed tax returns and claims for refund within three years of the due date for filing tax returns. We reverse the decision of the Tax Court and hold that the Tax Court had the authority to determine the amount of Lundy's refund for overpaid taxes.

V.

The Tax Court's interpretation of § 6512(b)(3)(B) in this case follows a recent trend in the Tax Court, beginning with *Allen v. Commissioner*, 99 T.C. 475 (1992), *aff'd*, 23 F.3d 406 (6th Cir.1994) (table), and

succeeded by at least nine other decisions of the Tax Court. See *Braman v. Commissioner*, T.C.M. (P-H) 92,636 (1992); *Davison v. Commissioner*, T.C.M. (P-H) 92,709 (1992), *aff'd*, 9 F.3d 1538 (2d Cir.1993) (table); *Durham v. Commissioner*, T.C.M. (P-H) 93,021 (1993); *Ermatinger v. Commissioner*, T.C.M. (P-H) 93,075 (1993); *Richards v. Commissioner*, T.C.M. (P-H) 93,102 (1993), *aff'd*, 37 F.3d 587 (10th Cir.1994); *Sumiel v. Commissioner*, T.C.M. (P-H) 93,104 (1993); *DiPlacido v. Commissioner*, T.C.M. (P-H) 93,169 (1993); *Patronik-Holder v. Commissioner*, 100 T.C. 374 (1993); *Olmstead v. Commissioner*, T.C.M. (P-H) 93,216 (1993). Furthermore, since the Tax Court decided Lundy's case, it has applied the same interpretation of § 6512(b)(3)(B) in at least nine other decisions. See *Phillips v. Commissioner*, T.C.M. (P-H) 93,284 (1993); *Rossmann v. Commissioner*, T.C.M. (P-H) 93,351 (1993); *Rackiewicz v. Commissioner*, T.C.M. (P-H) 93,617 (1993); *Rosencranz v. Commissioner*, T.C.M. (P-H) 94,075 (1994); *Dyball v. Commissioner*, T.C.M. (P-H) 94,076 (1994); *Kicza v. Commissioner*, T.C.M. (P-H) 94,115 (1994); *Floyd v. Commissioner*, T.C.M. (P-H) 94,379 (1994); *Glazier v. Commissioner*, T.C.M. (P-H) 94,415 (1994); *Khinda v. Commissioner*, T.C.M. (P-H) 94,617 (1994).¹¹

¹¹ Although the Tax Court applied the two-year limitation period under § 6512(b)(3)(B) in cases before Allen, we note that in those cases the taxpayer either did not file a tax return after receiving the notice of deficiency, *see, e.g., Liles v. Commissioner*, T.C.M. (P-H) 89,613 (1989); *Carey v. Commissioner*, T.C.M. (P-H) 87,452 (1987); *Nason v. Commissioner*, T.C.M. (P-H) 84,534 (1984); *Straw v. Commissioner*, T.C.M. (P-H) 83,641 (1983); *White v. Commissioner*, 72 T.C. 1126 (1979), or filed the tax return after petitioning the Tax Court, *see, e.g., Berry v. Commissioner*, 97 T.C. 339 (1991) (because notice of deficiency mailed more than five years after due date for filing tax returns, taxpayer could not collect refund even under three-year limitation period); *Morin v.*

Contrary to this recent trend, we emphasize that the IRS, until 1992, had *always* treated § 6512(b)(3)(B) as providing a three-year refund period where the taxpayer filed a tax return and a claim for refund after the IRS mailed the notice of deficiency. Only recently has the IRS interpreted § 6512(b)(3)(B) to provide only a two-year refund period in a situation like Lundy's. In fact, the Commissioner's February 19, 1991 answer to Lundy's petition for redetermination did not argue that his claim for refund was time-barred. Furthermore, the IRS sent Lundy a letter on February 3, 1992, informing him that he should either have received his refund check or should expect it soon. The IRS seemed ready to pay Lundy his refund prior to March 17, 1992, when the Commissioner moved to amend its answer and argued for the first time that the Tax Court did not have the authority to grant Lundy his refund. We suspect that the IRS's interpretation of § 6512(b)(3)(B) originated sometime in 1991 or 1992. Furthermore, the IRS's literature does not explain that a taxpayer who receives a notice of deficiency more than two years after the due date of tax returns and who subsequently files a tax return cannot claim a refund in the Tax Court.

The Tenth Circuit has explicitly followed the Tax Court's interpretation of § 6512(b)(3)(B) in a case with facts identical to Lundy's situation. *Richards v. Commissioner*, 37 F.3d 587 (10th Cir.1994).¹² Other

Commissioner, T.C.M. (P-H) 90,404 (1990) (taxpayer filed petition for redetermination before filing delinquent return). Thus, these cases are factually distinguishable from Lundy's case, and for this reason, we do not discuss them here.

¹² In cases with identical facts, the Second and Sixth Circuits have affirmed, without publishing an opinion, the Tax Court's interpretation of § 6512(b)(3)(B). *Allen v. Commissioner*, 99 T.C. 475 (1992), *aff'd* 23 F.3d 406 (6th Cir.1994)

circuits have followed the interpretation of § 6512(b)(3)(B) in other factual circumstances. See *Galuska v. Commissioner*, 5 F.3d 195 (7th Cir.1993) (applying two-year limitation under § 6512(b)(3)(B) where taxpayer filed petition in Tax Court four and one-half years after the due date for tax returns and one and one-half years after receiving the notice of deficiency); *Miller v. United States*, 38 F.3d 473 (9th Cir.1994) (recognizing that two-year limitation would have applied under § 6512(b)(3)(B) although taxpayer filed claim for refund in a United States district court and § 6511 applied); *Anderson v. Commissioner*, No. 93-2501, 1994 WL 483413 (4th Cir. Sept. 8, 1994) (applying two-year limitation under § 6512(b)(3)(B) where taxpayer filed petition in Tax Court more than three years after the due date for tax returns although only three months from receiving notice of deficiency). Because we depart from those circuits, we find it necessary to discuss their decisions.

The Seventh Circuit construed § 6512(b)(3)(B) in *Galuska v. Commissioner*, 5 F.3d 195 (7th Cir.1993). In that case, Galuska's 1986 income tax return was due on April 15, 1987. On April 15, 1987, he filed for an extension of time to file his tax return until August 15, 1987. He also made a payment of \$20,000, even though only \$3,531 had been withheld during 1986. On August 15, 1987, he filed for another extension until October 15, 1987. However, he did not file a return by that date either. On April 12, 1990, almost three years from the original due date for tax returns, the IRS mailed Galuska a notice of deficiency. On September 19, 1991, over one and one-half years after the mailing of the notice of deficiency, Galuska finally filed his tax return. The return showed that his tax

(table); *Davison v. Commissioner*, T.C.M. (P-H) 92,709, *aff'd* 9 F.3d 1538 (2d Cir.1993) (table).

liability was only \$1,448, and he filed a claim for refund in the Tax Court for his overpayment of \$22,083.

The Seventh Circuit held that Galuska could not receive his refund from the Tax Court because he had not paid his taxes within two years of the mailing of the notice of deficiency. The Seventh Circuit interpreted § 6512(b)(3)(B) to mean that Galuska is deemed to have filed his claim for refund in the Tax Court on April 12, 1990, the date of the mailing of the notice of deficiency. Because Galuska had not filed a tax return by April 12, 1990, the two-year limitation period under § 6511(b)(2)(B) applied. If the court had applied the three-year limitation period from the date of the mailing of the notice of deficiency, Galuska would have received his refund.

The Seventh Circuit bolstered its conclusion by noting that Galuska would not have received his refund if he had filed a claim in a district court. *Id.* at 197. This is true. Under § 6511(b)(2)(A), Galuska would have received a three-year refund period, plus an extra six months because of the extensions he received. However, Galuska paid his taxes on April 15, 1987, which is more than three years and six months from September 19, 1991, the date he filed his claim for refund.

Nonetheless, we believe that Galuska was correctly decided but for the wrong reason. The Tax Court should have applied a refund period of three years and six months, just as a district court would have, but started the refund period from the date of mailing the notice of deficiency. Because Galuska had paid his taxes on April 15, 1987, which is less than three years and six months from April 12, 1990, the date of the mailing of the notice of deficiency, Galuska should have received his refund.

What makes Galuska a difficult case is that Galuska, after receiving the notice of deficiency,

waited one and one-half years before filing his return. Our interpretation of § 6512(b)(3)(B) raises the specter that a taxpayer, knowing that the three-year refund period will run from the date of the mailing of the notice of deficiency, could wait ten or twenty years before filing a tax return and claiming his refund in Tax Court.

The Code, however, already prevents a taxpayer from delaying for so long. Section 6213(a) of the Code requires a taxpayer to file a petition for redetermination within 90 days of the mailing of the notice of deficiency. 26 U.S.C. § 6213(a). Section 6512(a) also requires the taxpayer to file a petition within the 90-day time period prescribed by § 6213(a). Thus, a taxpayer cannot delay for ten or twenty years and expect to collect his refund. If the taxpayer does not file a petition for redetermination¹³ within 90 days of the mailing of the notice of deficiency, the taxpayer cannot invoke the jurisdiction of the Tax Court in the first place.

The Seventh Circuit should have disposed of *Galuska* under § 6213(a). If *Galuska* had filed a tax return and a petition for redetermination anytime between April 12, 1990 and July 12, 1990, he should have received his refund. However, *Galuska* delayed until September 19, 1991. The Tax Court should have found *Galuska's* petition to be untimely under § 6213(a) and not reached the issue of the refund period under § 6512(b)(3)(B).

The Tenth Circuit recently construed § 6512(b)(3)(B) in a case with facts identical to that of *Lundy*. In *Richards v. Commissioner*, 37 F.3d 587 (10th Cir.1994), *Richards's* 1987 income tax return was due on April 15, 1988. However, *Richards* never filed a return, and on October 22, 1990, the IRS mailed a

¹³ If the taxpayer wants to file a claim for refund in the Tax Court, he would include it in his petition for redetermination.

notice of deficiency. On January 23, 1991, *Richards* filed a tax return showing an overpayment of income tax. *Richards* filed a claim for refund in the Tax Court.

The Tenth Circuit held that, under § 6512(b)(3)(B), *Richards* was deemed to have filed her claim for refund on October 22, 1990, the date of the mailing of the notice of deficiency. Because *Richards* did not file a tax return until January 23, 1991, the Tenth Circuit applied the two-year refund period under § 6511(b)(2)(B). Because *Richards* paid her taxes on April 15, 1988, more than two years before the date of the mailing of the notice of deficiency (October 22, 1990), the Tenth Circuit concluded that the Tax Court did not have the authority to grant *Richards* her refund.

For the reasons stated above, we disagree with the decision of the Tenth Circuit in *Richards* and refuse to follow it.

Although the facts in *Miller v. United States*, 38 F.3d 473 (9th Cir.1994), differ significantly from the case before us, we feel the need to discuss the Ninth Circuit's dicta regarding § 6512(b)(3)(B). In *Miller*, *Robin* and *Diane Miller* failed to file a joint return for the tax year 1986 on April 16, 1987. The IRS mailed the *Millers* a notice of deficiency on August 23, 1989. On April 16, 1990, the *Millers* mailed their 1986 tax return, which claimed a refund. The IRS received the tax return on April 18, 1990. The filing, however, was deficient because it lacked a necessary schedule and because a photocopy was sent instead of an original. The *Millers* filed a corrected return in February 1991. The IRS, however, issued a notice of disallowance of claim on May 23, 1991. The *Millers* filed an action in a United States District Court for the Western District of Washington in April 1992. Unlike *Lundy*, the *Millers* chose to sue in a district court instead of the Tax Court.

Because the Millers sued in a district court, § 6511 applied. The Millers are deemed to have paid their taxes on April 15, 1987. The Millers filed a claim for refund with the tax return, but it is not immediately clear whether they filed their tax return on April 16, 1990, when they mailed their original tax return; on April 18, 1990, when the IRS received the original tax return; or in February 1991, when the Millers filed a corrected tax return. The Ninth Circuit, however, did not address this issue.

Instead, the Ninth Circuit construed § 6511(a) to hold that the Millers' claim was untimely. Section 6511(a) provides:

Claim for credit or refund of an overpayment of any tax . . . shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid.

26 U.S.C. § 6511(a). The Ninth Circuit interpreted this provision to mean that a taxpayer who has not filed a tax return has two years to file a claim for refund. If the taxpayer has not filed a tax return as of two years after the date of payment of taxes, any claim for refund is untimely. 38 F.3d at 475. The Ninth Circuit reasoned:

Section 6511 has as its purpose foreclosing untimely claims. If the [three-year] clock were to run only from the filing of the return, no claim would ever be barred as long as the return was not filed. This result is precluded by the statutory insistence that a claim be filed within two years after the payment of the taxes "if no return was filed by the taxpayer." The point at which one must determine whether a return has or has not

been filed, for purposes of that clause, must be two years after payment. Otherwise, no claim could ever finally be barred by the two-year-after-payment clause because the taxpayer could at any time file a return and have three more years to assert the claim. . . . To hold that any return, no matter how delinquent, starts the three-year period would not only nullify part of § 6511, but also reward taxpayers for delaying the filing of their returns.

Id. at 475-76. We do not agree with the reasoning of the Ninth Circuit. A taxpayer, under § 6511(a), has three years from the date of the filing of even a delinquent tax return to file a claim for refund. This provision, however, gives no extra advantage to delinquent taxpayers. If the delinquent taxpayer does not file a tax return and a claim for refund within three years of the payment of taxes, the taxpayer will be prohibited from collecting a refund under § 6511(b)(2). Section 6511, read as a whole, does provide for the foreclosing of untimely claims. However, we read § 6511 to provide even delinquent taxpayers with three years to file their claims before losing them forever.

To bolster its misreading of § 6511(a), the Ninth Circuit argued that the Millers' claim would have been denied if they had filed in Tax Court instead of district court. The Ninth Circuit argued that, under § 6512(b)(3)(B), the relevant limitation period is that which would apply if a claim for refund had been filed on the date of the mailing of the notice of deficiency. Because Lundy had not filed a tax return on that date, the Ninth Circuit argued that the Tax Court would have applied a two-year limitation period. Because the notice of deficiency was mailed more than two years after the Millers paid their taxes, the Tax Court would have denied the refund.

According to the Ninth Circuit, the fact that the two-year period would apply in the Tax Court justified the application of two-year limitation in the district court. "The taxpayer is not supposed to derive an advantage by choosing one forum over another." *Id.* at 476. We agree that the Millers should have had the same period of time to file a claim for refund in the Tax Court that they had in the district court. However, we believe that they had three years from the payment of taxes to file their claim for refund. We disagree with the Ninth Circuit's interpretation of both § 6511(a) and § 6512(b)(3) (B).

Finally, our own Court has recently interpreted § 6512(b)(3)(B) in *Anderson v. Commissioner*, No. 93-2501, 1994 WL 483448 (4th Cir. Sept. 8, 1994) (per curiam) (unpublished). In *Anderson*, the Andersons did not file joint tax returns for 1986 and 1987 income taxes on April 15, 1987 and April 15, 1988, respectively, when they were due. On September 19, 1990, the Commissioner of Internal Revenue mailed notices of deficiency for the 1986 and 1987 tax years to Ann Anderson. On November 14, 1990, the Commissioner mailed notices of deficiency for the 1986 and 1987 tax years to Vernon Anderson. On December 12, 1990, the Andersons filed a petition for redetermination in the Tax Court. However, the Andersons had not filed tax returns on the date they filed their petition; they filed their tax returns on April 10, 1992.

This Court correctly held that the Tax Court did not have the authority to order a refund, even though the Andersons overpaid their taxes. The Tax Court correctly applied a two-year refund period because on the date that the Andersons actually filed their petition for redetermination, they had not yet filed a tax return. (It is insignificant that they had not filed a tax return on the date of the mailing of the notice of deficiency.) Because the Andersons had not paid

their taxes within two years of September 19, 1990, the date of the mailing of the notice of deficiency, the Tax Court could not grant a refund.

The facts of *Anderson*, however, are different from Lundy's case. Lundy filed his tax return on the same day he petitioned the Tax Court. Under these circumstances, the three-year refund period should have applied, and the Tax Court should have granted Lundy his refund.

VI.

We hold that the Tax Court should have applied the three-year refund period in Lundy's case. Because Lundy paid his taxes within three years prior to the date of the mailing of the notice of deficiency, the Tax Court had the authority to determine the amount of Lundy's overpayment of tax and to order a refund. We therefore reverse and remand the decision of the Tax Court.¹⁴

REVERSED AND REMANDED.

¹⁴ We deny as moot the Commissioner's motion to strike Lundy's second supplemental brief. At oral argument, we granted Lundy leave to file a second supplemental brief for the limited purpose of addressing the Ninth Circuit's recent decision in *Miller v. United States*, 38 F.3d 473 (9th Cir.1994). The Commissioner has moved to strike this brief because less than four pages of the 18-page brief discusses the *Miller* opinion. We have considered that portion of the brief that addresses the *Miller* opinion and have discussed that case in our opinion. So far as that part of the supplemental brief that refreshes the arguments in Lundy's original briefs, we regard such part as immaterial. Because of this pending motion, the Commissioner has not filed a response to Lundy's second supplemental brief. As our opinion makes clear, however, the *Miller* case is only marginally relevant to the case before us, and we do not find it necessary to delay filing our opinion because of the Commissioner's outstanding motion or because the Commissioner has not yet filed a response to Lundy's second supplemental brief.

APPENDIX B

UNITED STATES TAX COURT

T.C. Memo. 1993-278
No. 29009-90

ROBERT F. LUNDY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Filed June 28, 1993

P overpaid his 1987 Federal income tax through withholding. P's period for filing his 1987 income tax return was extended to Aug. 15, 1988. R mailed a notice of deficiency to P on Sept. 26, 1990. P filed a 1987 income tax return on Dec. 28, 1990, claiming an overpayment.

Held: Under sec. 6512(b)(3)(B), I.R.C. 1986, the statute of limitations on credit or refund of a tax overpayment determined by the Tax Court requires application of rules to facts existing at the date of the mailing of the notice of deficiency. If no tax return had been filed by that date, then the "look-back" period as to an overpayment determined by the Tax Court is the 2 years immediately preceding the mailing of the notice of deficiency. Sec. 6511(b)(2)(B), I.R.C. 1986. P's tax payments were made more than 2 years before the notice of deficiency was mailed, and so P is not entitled to credit or refund of the amount by which he overpaid his 1987 income tax.

MEMORANDUM FINDINGS OF FACT AND OPINION

CHABOT, Judge:

Respondent determined a deficiency in Federal individual income tax against petitioner for 1987 in the amount of \$13,806, and additions to tax under section 6651(a)¹ (failure to file) in the amount of \$1,502.25, section 6653(a)(1)(A) (negligence, etc.) in the amount of \$690.30, and section 6653(a)(1)(B) in the amount of 50 percent of the interest on \$6,009.

After concessions by both sides,² the issue for decision is whether petitioner is barred by the time limitations under sections 6511 and 6512 from obtaining from this Court a determination that he has an overpayment of his 1987 Federal individual income tax.

FINDINGS OF FACT

Some of the facts have been stipulated. The stipulations and stipulated exhibits are incorporated herein by this reference.

¹ Unless indicated otherwise, all section references are to sections of the Internal Revenue Code of 1986 as in effect for 1987; references to secs. 6511 and 6512 are to those sections of the Internal Revenue Code of 1986 as in effect for the date on which respondent mailed the notice of deficiency.

² The parties agree that petitioner has a deficiency of \$778, that he is liable for an addition to tax under sec. 6653(a)(1)(A) in the amount of \$369, see sec. 6653(c)(1), and that he is not liable for additions to tax under secs. 6511(a) and 6653(a)(1)(B). Respondent's sec. 6651(a) concession preceded this Court's opinion in *Patronik-Holder v. Commissioner*, 100 T.C. ____ (1993); respondent's concession in the instant case is consistent with our opinion in *Patronik-Holder*, even though it conflicts with the position respondent took in *Patronik-Holder*.

When the petition was filed in the instant case, petitioner resided in Lorton, Virginia.

In early 1980 petitioner's briefcase, containing records necessary for preparing his income tax returns, was stolen. Petitioner told respondent's employees about this situation, and was told that if petitioner intended to claim a refund, then he had 3 years in which to file his return and claim the refund. Petitioner filed his income tax return for that year almost 3 years late, and he also filed some other income tax returns almost 3 years late during the 1980's. On several occasions in the 1980's one or another agent of respondent told petitioner that he had 3 years in which to file a claim for refund, but that petitioner should get his income tax returns filed as soon as possible.

In 1987 Federal individual income taxes were withheld from the income of petitioner and his then wife, Carol A. Lundy (hereinafter sometimes referred to as Carol), in the amount of \$10,131.11 (petitioner—\$7,797.31; Carol—\$2,333.80). No later payments were made on this account. Petitioner timely requested an automatic extension of time to file his tax return for 1987; the filing period was extended to August 15, 1988. From 1988 through 1990 petitioner had health problems, was hospitalized after a car accident, dealt with various family problems, and was involved in a divorce. On June 4, 1990, respondent sent a letter to petitioner stating that if respondent did not hear from petitioner within 30 days, then respondent would prepare a substitute return for 1987 for petitioner. In response, on July 3, 1990, petitioner wrote to respondent stating that he had not yet filed his 1987 income tax return, but that he would "file within the three year period to claim [his] refund". From June 1988 until September 1990, respondent contacted petitioner twice about his 1987 Federal income tax return. Each time respondent asked petitioner to file

his tax return "as soon as possible". On these occasions, respondent did not tell petitioner that he did not have to file his 1987 tax return for 3 years.

On September 26, 1990, respondent mailed to petitioner a notice of deficiency for 1987.

Petitioner and Carol submitted to respondent a joint 1987 tax return dated December 22, 1990. Respondent received this tax return on December 28, 1990. On this 1987 tax return, petitioner and Carol³ reported adjusted gross income of \$76,485, income tax liability of \$6,594, and income tax withheld of \$10,131, and claimed a refund of \$3,537. Petitioner had not previously filed a Federal 1987 income tax return.

On December 28, 1990, petitioner filed a petition in the Tax Court. Respondent filed the answer on February 19, 1991. From March 1991 to January 1992, petitioner was involved in negotiations, both in person and on the phone, with respondent's Appeals officer. On February 3, 1992, respondent sent to petitioner and Carol a letter stating that petitioner and Carol would receive a refund of 1987 taxes in the amount of \$3,537, the amount claimed on the late-filed tax return.

On March 17, 1992, respondent moved for leave to amend the answer to assert, for the first time, that petitioner's claim for refund is barred by the statute of limitations. After a hearing, this motion was granted on March 30, 1992.⁴

³ Petitioner and Carol may file a joint income tax return after the notice of deficiency has been mailed. *Phillips v. Commissioner*, 86 T.C. 433 (1986), affd. on this issue and revd. on another issue 851 F.2d 1492, 1496-1498 (D.C. Cir. 1988). This is why the opinion and the stipulations take Carol's income and withholding into account even though the notice of deficiency was addressed only to petitioner.

⁴ As we have noted, sec. 6512(b) includes words suggesting that this statute of limitations may be jurisdictional. *Woody v.*

Petitioner's and Carol's correct tax liability for 1987 is \$7,372;⁵ they are overwithheld in the amount of \$2,390.11.⁶

OPINION

Petitioner's and Carol's, see *supra* note 3, 1987 taxes were paid more than 2 years before respondent mailed the notice of deficiency to them (Sept. 26, 1990), and less than 3 years before petitioner and Carol filed their 1987 tax return (Dec. 28, 1990).

Petitioner contends that, under section 6511(b)(2)(A), he is entitled to recover an overpayment of income tax paid within 3 years before he made his claim for overpayment and that the claim was the 1987 tax return that he and Carol filed. Respondent contends that the combined effect of sections 6512(b)(3)(B) and 6511(b)(2)(B) is that petitioner is entitled to recover only those payments made within 2 years before the notice of deficiency was mailed. Petitioner responds that respondent's analysis gives respondent the right to cut off a portion of petitioner's statutory limitations period. Respondent answers that that is the result of the plain language of the statute.

We agree with respondent.

Commissioner, 95 T.C. 193, 204 (1990); *Hollie v. Commissioner*, 73 T.C. 1198, 1205 n.9 (1980).

⁵ The \$7,372 stipulated liability, less the \$6,594 liability that petitioner and Carol reported on their late-filed tax return, results in the stipulated \$778 deficiency. See *supra* note 2.

⁶ The overwithholding is calculated by adding the negligence addition, *supra* note 2, to petitioner's and Carol's tax liability (\$7,372 + \$369 = \$7,741) and subtracting that sum from the amount withheld (\$10,131.11 - \$7,741 = \$2,390.11).

A. Statutory Analysis

Section 6511⁷ provides the general statute of

⁷ Sec. 6511 provides, in pertinent part, as follows:

SEC. 6511. LIMITATIONS ON CREDIT OR REFUND.

(a) Period of Limitation on Filing Claim.—Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. * * *

(b) Limitation on Allowance of Credits and Refunds.—

(1) Filing of claim within prescribed period.—No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period.

(2) Limit on amount of credit or refund.—

(A) Limit where claim filed within 3-year period.—If the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return. * * *

(B) Limit where claim not filed within 3-year period.—If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.

limitations for credits or refunds. Section 6512⁸ provides a special rule for credits or refunds "in case

(C) Limit if no claim filed.—If no claim was filed, the credit or refund shall not exceed the amount which would be allowable under subparagraph (A) or (B), as the case may be, if claim was filed on the date the credit or refund is allowed.

⁸ Sec. 6512 provides, in pertinent part, as follows:

SEC. 6512. LIMITATIONS IN CASE OF PETITION
TO TAX COURT.

(a) Effect of Petition to Tax Court.—If the Secretary has mailed to the taxpayer a notice of deficiency under section 6212(a) (relating to deficiencies of income, estate, gift, and certain excise taxes) and if the taxpayer files a petition with the Tax Court within the time prescribed in section 6213(a) * * *, no credit or refund of income tax for the same taxable year, * * * to which such petition relates, in respect of which the Secretary has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of the tax shall be instituted in any court except—

(1) As to overpayments determined by a decision of the Tax Court which has become final; * * *

* * * * *

(b) Overpayment Determined by Tax Court.—

(1) Jurisdiction to determine.—Except as provided by paragraph (3) and by section 7463, if the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of income tax for the same taxable year, * * * in respect of which the Secretary determined the deficiency, or finds that there is a deficiency but that the taxpayer has made an overpayment of such tax, the Tax Court shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Tax Court has become final, be credited or refunded to the taxpayer.

of petition to Tax Court". Section 6512(a)(1) permits suits by taxpayers for the recovery of any part of the tax "As to overpayments determined by a decision of the Tax Court which has become final". Section 6512(b)(1) provides that "Except as provided by paragraph (3)" the Tax Court may determine an overpayment, which shall be credited or refunded. Section 6512(b)(3)⁹ provides that there shall not be a credit or refund of any portion of the tax unless that portion was paid during one of three time periods. The only one of these periods that petitioner contends is applicable is the one in section 6512(b)(3)(B).

Section 6512(b)(3)(B) permits a credit or refund if the Court determines that the tax was paid—

within the period which would be applicable under section 6511(b)(2), (c), or (d), if on the date of the mailing of the notice of deficiency a claim had

* * * * *

(3) Limit on amount of credit or refund.—No such credit or refund shall be allowed or made of any portion of the tax unless the Tax Court determines as part of its decision that such portion was paid—

* * * * *

(B) within the period which would be applicable under section 6511(b)(2), (c), or (d), if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) stating the grounds upon which the Tax Court finds that there is an overpayment, * * *

⁹ Many prior opinions refer to sec. 6512(b)(2). However, sec. 6244(a) of the Technical and Miscellaneous Revenue Act of 1988 (TAMRA), Pub. L. 100-647, 102 Stat. 3342, 3750, redesignated sec. 6512(b)(2) as sec. 6512(b)(3), effective for overpayments determined by the Tax Court which had not been refunded on the 90th day after Nov. 10, 1988. TAMRA sec. 6244(c).

been filed (whether or not filed) stating the grounds upon which the Tax Court finds that there is an overpayment, * * *

Both sides agree that subsections (c) and (d) of section 6511 do not affect the instant case, and that our focus should be on section 6511(b)(2). We arrive at section 6511(b)(2) because we have been instructed to go there by section 6512(b)(3)(B). See *Gunther v. Commissioner*, 92 T.C. 39, 61-63 (1989), affd. 909 F.2d 291 (7th Cir.1990). The instruction in section 6512(b)(3)(B) directs us to focus on the situation as it would have been on a specified date—the date of the mailing of the notice of deficiency. Thus, this provision requires us to “take a snapshot” of the situation as of September 26, 1990. With that in mind, we proceed to section 6511(b)(2).

Section 6511(b)(2) has three subparagraphs, each providing what has been referred to as a “look-back” rule. (See our recent comment in *Allen v. Commissioner*, 99 T.C. 475, 478-479 n. 5 (1992), on appeal (6th Cir., Feb. 16, 1993), noting the difference between the look-back periods described in section 6511(b)(2) and the period for filing a claim described in section 6511(a).) The dispute centers on whether subparagraph (A) or (B) of section 6511(b)(2) applies. Neither side contends that subparagraph (C) applies.

Section 6511(b)(2)(A) provides the rule for the situation where “the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a)”. For any tax “in respect of which tax the taxpayer is required to file a return”, section 6511(a) prescribes only the period “within 3 years from the time the return was filed”. On September 26, 1990, the deemed-claim date, petitioner’s and Carol’s 1987 tax return had not been filed, so there was no “3-year period prescribed in subsection (a)”. Because there was no 3-year period as prescribed in section 6511(a),

no claim had been filed within that 3-year period. Therefore, section 6511(b)(2)(A) cannot provide the rule for decision in the instant case.

Section 6511(b)(2)(B) provides the rule for the situation where the claim was filed, but not within the 3-year period prescribed in section 6511(a). This is the situation in the instant case. That is, section 6512(b)(3)(B) directs us to make a determination assuming that a claim for credit or refund was filed on September 26, 1990 (the date the notice of deficiency was mailed), but no tax return had been filed by that date, so the deemed claim for credit or refund was not filed within the 3-year period prescribed in section 6511(a). In this situation, section 6511(b)(2)(B) provides a 2-year look-back period. That is, “the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.” Petitioner’s and Carol’s 1987 income taxes were paid entirely by withholding in 1987, and so were deemed paid on April 15, 1988. Sec. 6513(b)(1). April 15, 1988, is more than 2 years before September 26, 1990. Thus, no portion of petitioner’s and Carol’s 1987 income taxes was paid within the 2-year period immediately before September 26, 1990.

We conclude from the foregoing that petitioner is not entitled to a determination from this Court that he has an overpayment that can be credited or refunded. This conclusion is consistent with a long line of Tax Court precedents, among the most recent of which are *Patronik-Holder v. Commissioner*, 100 T.C. ____ (1993); *Allen v. Commissioner*, *supra*; *Galuska v. Commissioner*, 98 T.C. 661 (1992); and *Berry v. Commissioner*, 97 T.C. 339 (1991).

Petitioner contends that the concept of a “deemed claim” is not found in section 6512(b)(3)(B). We disagree. The language “if on the date of the mailing of the notice of deficiency a claim had been filed

(whether or not filed)" specifically directs this Court to assume a claim had been filed—a deemed-claim concept.

Petitioner also contends that the deemed claim should include a "deemed return". Again, we must disagree. Although one document could serve both functions—be a tax return and also be a claim for credit or refund—it does not follow that "tax return" and "claim for credit or refund" are interchangeable terms. In section 6511(a), the Congress uses the term "return" three times and the term "Claim for credit or refund" twice in close juxtaposition. From this, we conclude that the Congress understood there was a difference between a tax return and a claim for credit or refund. In section 6512(b)(3)(B), the application of which depends in part on section 6511(a), the Congress refers to a claim for credit or refund and does not refer to a tax return. From this, we conclude that, although section 6512(b)(3)(B) embodies a deemed-claim concept, it does not embody a deemed-return concept.

Petitioner also contends that our interpretation of section 6512(b)(3)(B) effectively causes the phrase "no return" in section 6511(a) to mean "no timely return". We do not agree that our interpretation creates this result. The interplay of section 6512(b)(3)(B) and section 6511(b)(2) requires that, if the taxpayer files a timely petition with the Tax Court, then the tax return must have been filed before the notice of deficiency was mailed in order for a taxpayer to have the 3-year look-back under section 6511(b)(2)(A). In the instant case, if petitioner had filed his untimely tax return 2 years late, he would have been entitled to the benefit of the 3-year look-back. For purposes of the deemed claim for credit or refund, there is no requirement that the tax return be "timely" in the sense of having been filed by the due date (or extended due date) thereof.

Petitioner also contends that our interpretation of section 6512(b)(3)(B) amounts to a penalty to a taxpayer who files a late return. Petitioner contends that the Congress enacted section 6651 to provide an addition to tax for a late-filed return. However, a statute of limitations does not provide for a "penalty"; rather, "a statute of limitation is an almost indispensable element of fairness as well as of practical administration of an income tax policy." *Rothensies v. Electric Battery Co.*, 329 U.S. 296, 301 (1946); *Texas Co. (Caribbean) Ltd. v. Commissioner*, 12 T.C. 925, 930 (1949). A limitation on the recovery of an overpayment resulting from a late-filed tax return is not inconsistent with an addition to tax imposed on account of an unwarranted failure to file a timely tax return.

We conclude that, as a matter of statutory analysis, petitioner is not entitled to the relief he seeks from this Court.

B. Other Considerations

Petitioner contends that, if he had filed a claim for refund in a District Court or in the Court of Federal Claims, then either of those courts would have had jurisdiction, under section 6511, to refund his overpayment. Petitioner contends that the Congress did not intend a different result for a taxpayer who elects to file a petition in Tax Court and thereby invokes section 6512. Petitioner contends that the Congress did not intend to create a "jurisdictional asymmetry" when it enacted section 6512(b)(3)(B). Petitioner contends that the Congress did not intend to empower respondent to unilaterally shorten the period for filing a claim, by mailing a notice of deficiency. Petitioner contends that section 6512(b)(3)(B) should be construed in the context of section 6511. In support of his contentions, petitioner points to the legislative history of section 6511.

Petitioner contends that respondent's administrative practice should affect our reading of the statute. Petitioner contends that respondent's employees acted in such a way as to mislead petitioner, and so respondent should be estopped to deny the allowability of the credit or refund.

We consider these contentions seriatim.

1. Other Courts

Several of petitioner's contentions are based on the idea that a holding for respondent in the instant case would disturb an existing symmetry (at least as to statutes of limitations) among the different forums to which petitioner could have brought his dispute.

Before maintaining a refund suit, the taxpayer must file a claim for credit or refund. Sec. 7422(a). This claim must be filed timely, in accordance with the statute of limitations. Sec. 6511. The doctrine of "variance" imposes potentially severe restrictions on the taxpayer, with the result that the statute of limitations operates not only to bar late-filed claims, but even to bar grounds for recovery at variance with those initially asserted in timely claims. One well-known text, Junghans & Becker, *Federal Tax Litigation* (2d ed. 1992), summarizes the doctrine as follows:

The single most important component of every claim for refund is the taxpayer's statement of the grounds for recovery, which provides the basis for the issues the taxpayer can raise in his refund suit. Grounds for recovery not asserted in the refund claim generally cannot be raised and relied on by the taxpayer in subsequent litigation. The special defense of "variance" is available to the government if a taxpayer, at trial, seeks to rely on a ground not included in the refund claim. [*Id.* par. 16.03[2][e], at 16-20; fn. ref. omitted.]

* * * * *

A claim for refund is a jurisdictional prerequisite to filing a refund suit. As a result, in a refund suit, the taxpayer's grounds for recovery are limited to those grounds set forth in the claim for refund on which the suit is based. A corollary to this rule is that a taxpayer may not advance a ground or legal theory in his refund suit that is entirely different from any ground or legal theory advanced in his claim for refund. Where a taxpayer in a refund suit seeks recovery on grounds not presented in his claim, a fatal variance exists and his action is subject to dismissal. [*Id.* par. 18.02[3], at 18-11; fn. refs. omitted.]

See, e.g., *Charter Co. v. United States*, 971 F.2d 1576, 1579 (11th Cir.1992); *Beckwith Realty, Inc. v. United States*, 896 F.2d 860, 862-863 (4th Cir.1990).

By contrast, section 6512(b)(3)(B) provides that the taxpayer in the Tax Court gets the benefit of a deemed claim "stating the grounds upon which the Tax Court finds that there is an overpayment". Thus, the variance restriction on the statute of limitations for credits or refunds applies in refund suits, but does not apply in the Tax Court.

On the deficiency side, too, the statute of limitations applies differently in the Tax Court. Section 6214(a) authorizes the Tax Court to redetermine a deficiency in an amount greater than that determined in the notice of deficiency, "if claim therefor is asserted by the Secretary at or before the hearing or a rehearing." The statute of limitations on assessments and collections is suspended if a Tax Court petition is filed. Sec. 6503(a).

However—

The statute of limitations is not suspended by suit in a refund forum, and the government cannot assess any deficiency more than three years after the filing of the relevant tax return unless the assessment is for fraud or one of the other events that extends the normal limitations period. Because the taxpayer almost always can delay the filing of a refund suit until after the expiration of the limitations period on assessments, this shield is usually available to any taxpayer in the refund forums. The government, of course, can raise new issues in tax refund suits. However, if the statute of limitations on assessments has run, these new issues may be used only to offset the taxpayer's eventual recovery. The new issues cannot result in a net recovery for the government. * * * [Junghans & Becker, *supra* par. 3.06, at 3-16; fn. ref. omitted.]

Thus, there clearly are differences between the application of the statutes of limitations to Tax Court proceedings and the application to refund proceedings in other courts. In general, the rules operate so that, in a proceeding properly brought in the Tax Court, the parties are permitted (subject to our motion practice considerations) to present matters that they could have presented at the date the notice of deficiency was mailed. On the other hand, in refund suits the statutes of limitations grind on and both sides are limited to the amounts (and the taxpayer is even limited to the grounds for recovery) established when the limitations period expired. Our reading of the statute in the context of the instant case—that the controlling factor is the facts on the date the notice of deficiency was mailed—is not rebutted by petitioner's contentions about symmetry among the courts.

2. Legislative History

Petitioner points us to legislative history involving revision of section 322(b)(2) of the Internal Revenue Code of 1939 by section 6511(a) when the Internal Revenue Code of 1954 was enacted, together with the further revision of section 6511(a) by the Technical Amendments Act of 1958. Petitioner also points us to legislative history of 1954 and 1958 to show a congressional intent to have uniformity between the 3-year assessment rule of section 6501(a) and the 3-year claim-for-credit-or-refund rule of section 6511(a).

It is well established that we may look to the legislative history of a statute where the statute is ambiguous. In addition, we may seek out any reliable evidence as to legislative purpose even where the statutory language appears to be clear. *United States v. American Trucking Associations*, 310 U.S. 534, 543-544 (1940); *U.S. Padding Corp. v. Commissioner*, 88 T.C. 177, 184 (1987), affd. 865 F.2d 750 (6th Cir.1989); *Huntsberry v. Commissioner*, 83 T.C. 742, 747-748 (1984); *J.C. Penney Co. v. Commissioner*, 37 T.C. 1013, 1017 (1962), affd. 312 F.2d 65 (2d Cir.1962). Where a statute appears to be clear on its face, we require unequivocal evidence of legislative purpose before construing the statute so as to override the plain meaning of the words used therein. *Huntsberry v. Commissioner*, 83 T.C. at 747-748; see *Pallottini v. Commissioner*, 90 T.C. 498, 503 (1988), and cases there cited.

When section 6511 was enacted in 1954 as part of the revision that became the Internal Revenue Code of 1954, it measured the period for filing a claim as ending 3 years from the time the tax return was required to be filed (determined without regard to any extension of time), or 2 years from the time the tax was paid, whichever ended later. Section 82(a) of the Technical Amendments Act of 1958, Pub.L. 85-866, 72

Stat. 1606, 1663, amended section 6511(a) to provide that the period for filing a claim for refund was measured from the filing of the return, rather than the time the return was required to be filed. The Senate Finance Committee report, S. Rept. 1983, 85th Cong., 2d Sess. 98-99 (1958), 1958-3 C.B. 922, 1019-1020, states as follows:

(a) *Period for filing claim.*—Under present law a claim, to be valid, must in general be filed within 3 years from the due date of the return, without regard to any period of extension granted for the filing of the return (or within 2 years from the time of tax payment, whichever is later). However, the rule with respect to assessments is that the period of limitation is 3 years from the date the return was actually filed, whether or not filed when it was due. To correlate these rules the House bill (by amending sec. 6511(a)) provides that a claim for refund or credit of any tax may be filed within 3 years from the time the return was actually filed (or, as under present law, within 2 years from the time of payment, whichever is later). Your committee has accepted this change.

(b) *Limit on credit or refund.*—Present law as one alternative provides that the amount of any credit or refund allowed cannot exceed the portion of the tax paid within a period of 3 years immediately preceding the filing of the claim. To correspond with the amendment described above, the House bill provides that in such cases the amount to be refunded or credited is not to exceed that portion of the tax which was paid within a period of 3 years preceding the filing of the claim plus the period of any extension of time for filing

the return. Your committee has accepted this change.

Under section 6511 as it was from the 1954 Code enactment to the 1958 act, the subsection (b) references to “the 3-year period prescribed in subsection (a)” are references to “3 years from the time the return was required to be filed”. Under the “snapshot” analysis we have used, *supra*, the initial 1954 Code language would have resulted in a conclusion that the deemed claim was filed within the 3-year period, and so petitioner would have been entitled to the 3-year look-back under section 6511(b)(2)(A). However, it is clear that the Congress perceived a defect in section 6511(a) as originally enacted, and that the remedy that the Congress enacted in 1958 was intended to work some changes.

The parties have not pointed us to, and we have not found, any legislative history evidence as to whether the Congress analyzed all the changes that their 1958 act amendments caused. Nothing that we see indicates a clear congressional intent that a taxpayer be entitled to a 3-year look-back on the facts of the instant case.

However these arguments may be weighed, one thing that is clear is that the legislative history of section 6511 does not present the unequivocal evidence of legislative purpose that would warrant our construing the statute so as to override the plain meaning of the words used therein. Compare *Estate of Sachs v. Commissioner*, 88 T.C. 769, 772-778 (1987), *affd.* on this issue and *revd.* on another issue 856 F.2d 1158 (8th Cir.1988), with *Gunther v. Commissioner*, 92 T.C. 39 (1989), *affd.* 909 F.2d 291 (7th Cir.1990). We have not found anything in the legislative history of section 6511 that would require us to conclude that the Congress did not mean exactly what it said. See

Cal-Maine Foods, Inc. v. Commissioner, 93 T.C. 181, 215 (1989), and cases there cited.

Accordingly, we conclude that the legislative history does not provide a proper basis for reading the statute in petitioner's favor.

3. Respondent's Administrative Practice

Petitioner contends that respondent has had a longstanding administrative practice of granting refunds where the return is filed within 3 years of the date the tax was paid, and that this practice must be deemed to have been approved by the Congress and to have acquired the force of law. Petitioner relies on respondent's actions in *Domtar Newsprint Sales Ltd. v. United States*, 193 Ct.Cl. 505, 435 F.2d 563 (1970); *Dillard v. Commissioner*, T.C.Memo. 1992-126; *Long v. United States*, 51 AFTR 2d 83-816, 83-1 USTC par. 9155 (D.Mass.1983); Rev.Rul. 76-511, 1976-2 C.B. 428; and Rev.Rul. 57-354, 1957-2 C.B. 913.

The chronology in *Domtar* differs in a critical respect from that in the instant case. In the instant case, petitioner is treated as having filed his claim for credit or refund (on Sept. 26, 1990) *before* he filed his tax return (on Dec. 28, 1990). In *Domtar* the taxpayer filed its claim for credit or refund (on May 14, 1968) *after* it filed its tax return (on May 3, 1968). The Court of Claims analyzed section 6511(a) in *Domtar Newsprint Sales Ltd. v. United States*, 435 F.2d at 566, as follows:

The status of a claim for refund must in the final analysis be determined in the light of the facts as they exist at the time it is filed. Thus, if no return was filed prior to the filing of a claim for refund, the two-year period of limitation is applicable in determining the timeliness of the claim. However, if a return was filed prior to the

filing of a claim for refund, the three-year period of limitation governs. [Emphasis added.]

This conclusion as to section 6511(a) is similar to that we have reached for the Tax Court under sections 6512(b)(3)(B) and 6511(b). Thus *Domtar* does not help petitioner; rather, it demonstrates the reasonableness of the approach we have used and the conclusion we have reached in the instant case.

Dillard v. Commissioner, T.C.Memo. 1992-126, involved overpayments through withholding for 1987 and 1988. The taxpayers did not file income tax returns for 1987 or 1988 until October 1991. Respondent mailed a notice of deficiency to the taxpayers on July 11, 1990. The *Dillard* opinion notes that respondent allowed the refund for 1988. Petitioner contends that this illustrates respondent's practice of refunding overpayments where a tax return is filed within 3 years of the time the tax was paid. We conclude that the facts in *Dillard* as to 1988 support respondent's position and illustrate the operation of section 6512. The taxpayers in *Dillard* were deemed to have paid their 1988 taxes on April 15, 1989. In *Dillard* the notice of deficiency operated as the taxpayers' deemed claim for credit or refund. At the time of the deemed claim, the taxpayers had not filed a tax return for 1988, so the 2-year look-back applied. The deemed claim for credit or refund of 1988 taxes was filed (July 11, 1990) within 2 years of the time the tax was deemed paid (April 15, 1989), and so the taxpayers were entitled to a credit or refund for 1988.¹⁰

¹⁰ As noted in *Allen v. Commissioner*, 99 T.C. 475, 481-482 (1992), on appeal (6th Cir., Feb. 16, 1993), as to the issue of the refund of 1987 taxes, *Dillard v. Commissioner*, T.C.Memo. 1992-126, contains some language which appears to support petitioner's position. However, that language is not controlling because as to the 1987 overpayment, *Dillard* is distinguishable

In *Long v. United States*, 51 AFTR 2d 83-816, 83-1 USTC par. 9155 (D.Mass.1983), the taxpayers' only claims for credit or refund for the years before the District Court were the claims embodied in their tax returns. There was no notice of deficiency for these years, and so there was no petition to the Tax Court, section 6512 did not apply, and the deemed-claim rule of section 6512(b)(3)(B) was irrelevant. Under these circumstances, the question of a 2-year look-back was not before either the District Court or the Internal Revenue Service. As a result, the Internal Revenue Service's 3-year approach to the facts in *Long* does not help petitioner, because it does not provide a clue as to respondent's administrative practice with respect to the facts of the instant case.

For the same reasons, the two rulings, which do not involve notices of deficiency, do not help petitioner, because they do not illuminate respondent's administrative practice as applicable to the facts before us in the instant case. Indeed, Rev.Rul. 57-354, 1957-2 C.B. 913, may help respondent, because it includes the same language that we have quoted from the Court of Claims opinion in *Domtar Newsprint Sales Ltd. v. United States*, *supra*.

From the foregoing, we conclude that there is no evidence that respondent has had a longstanding administrative practice of granting refunds where, as here, the deemed claim preceded the tax return and was deemed made more than 2 years after the tax was paid.

Petitioner's failure to show the contended-for administrative practice makes it unnecessary to consider petitioner's legislative reenactment doctrine argument. By the same token, it is not necessary to consider petitioner's contention that he

from the instant case in that in *Dillard* the taxpayer was outside the 3-year look-back period.

was treated differently from similarly situated taxpayers.

4. Estoppel

Petitioner contends that the result in the instant case is the fault of respondent, rather than petitioner. Petitioner contends that he was misled by respondent because he relied on respondent's employees' representations that a taxpayer has 3 years from the time the tax was paid to file a return or claim for credit or refund. Petitioner does not claim that any specific type of estoppel should be applied to respondent. However, his contentions are similar to the equitable estoppel argument which was rejected in *Dillard v. Commissioner*, T.C.Memo. 1992-126, and we also reject it in the instant case. The doctrine of equitable estoppel is applied against the Government only with the utmost caution and restraint. *Boulez v. Commissioner*, 76 T.C. 209, 214-215 (1981), *affd.* 810 F.2d 209 (D.C.Cir.1987). Petitioner testified that respondent's employees urged him to file his 1987 tax return as soon as possible. As noted in Rev.Rul. 57-354, *supra*, which petitioner relies on for his administrative practice argument, for at least a generation respondent has warned that if a taxpayer files a claim for credit or refund before filing a tax return for that period, then the taxpayer may lose an opportunity to get the credit or refund. Finally, the deemed-claim rule is specifically provided by statute.

There is no basis for an estoppel against respondent in the instant case. See *Miller v. United States*, 949 F.2d 708, 712-713 (4th Cir.1991).

The result of a statute of limitations bar on credit or refund may seem harsh in view of the actual overpayment, *e.g.*, *Allen v. Commissioner*, 99 T.C. at 480; *Berry v. Commissioner*, 97 T.C. 339, 345 (1991). However, the statute is intricate and precise, *e.g.*, *Allen v. Commissioner*, *supra*; see (as to section

6501) *Minahan v. Commissioner*, 88 T.C. 492, 505 (1987). We apply the statute as the Congress enacted it.

We conclude that petitioner is not entitled to a determination that he has an overpayment of 1987 income taxes. To take account of the parties' concessions, *supra* note 2,

Decision will be entered under Rule 155.